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No. _____

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

CLARK-COWLITZ JOINT OPERATING AGENCY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

The Federal Energy Regulatory Commission (FERC) held a declaratory order proceeding called *Bountiful* to determine whether Section 7(a) of the Federal Power Act of 1920 grants a preference to states and municipalities over existing licensees in hydroelectric relicensing proceedings. Pacific Power & Light Co. (PP&L), the existing licensee of the Merwin project, was a party in *Bountiful* and urged no preference. Clark-Cowlitz Joint Operating Agency (CCJOA), a municipality under the Act and a competing applicant for the new Merwin license, was also a party and argued preference applied. FERC held Section 7(a) does grant a preference, the Eleventh Circuit affirmed and certiorari was denied. An Administrative Law Judge applied the preference in the *Merwin* project relicensing proceeding and awarded the new license to CCJOA. But FERC reversed the ALJ and itself, held there was no preference, and awarded the new license to PP&L. A D.C. Circuit panel reversed FERC's statutory construction and held that preclusion principles barred relitigation of the preference issue. A split en banc D.C. Circuit found preclusion principles irrelevant, affirmed FERC's statutory construction as reasonable, but remanded FERC's analysis of the economic impacts of a license transfer.

The questions presented are:

1. Is FERC's *Bountiful* holding on municipal preference res judicata in *Merwin* under this Court's decision in *United States v. Utah Constr. & Mining Co.*?
2. Does the preference established for a state or municipality by Section 7(a) of the Federal Power Act as enacted in 1920 apply in a relicensing proceeding against an existing licensee that is neither a state nor a municipality?
3. May FERC circumvent the statutory preference based on its own view of the economic effects of a license transfer?

LIST OF PARTIES

The parties to the proceedings before the D.C. Circuit Court of Appeals were the petitioner, Clark-Cowlitz Joint Operating Agency and the respondent, Federal Energy Regulatory Commission.

Intervenors below in support of petitioner were the American Public Power Association, the City of Bountiful, Utah, the City of Santa Clara, California, Northern California Power Agency, Sacramento Municipal Utility District, and the Cities of Anaheim, Azusa, Banning, Colton and Riverside, California.

Intervenors below in support of FERC were the Pacific Power and Light Company, Edison Electric Institute, People of the State of California, *et al.*, Pacific Gas and Electric Company, Public Utility Commissioner of the State of Oregon, and the American Paper Institute, Inc.

Intervenors below on issues of mitigation measures for fish and wildlife were the Washington Department of Fisheries and the Washington Department of Game.

In addition, the United States, by the Department of Justice, filed an *amicus curiae* brief in support of FERC's petition for rehearing en banc and participated in the supplemental briefing requested by the en banc court.

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**PETITION FOR A WRIT OF CERTIORARI TO THE
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The petitioner, Clark-Cowlitz Joint Operating Agency (CCJOA) respectfully prays that a writ of certiorari issue to review the en banc opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled proceeding on August 11, 1987 and further prays that the latter opinion and judgment be summarily reversed.

OPINIONS BELOW

The en banc opinion of the Court of Appeals for the District of Columbia Circuit in *Clark-Cowlitz Joint Operating Agency v. Fed. Energy Regulatory Comm'n* ("Merwin") is reported at 826 F.2d 1074, and is reprinted in the separate Appendix accompanying this petition, at 1a-56a.

The panel opinion of the Court of Appeals for the District of Columbia Circuit in *Clark-Cowlitz Joint Operating Agency v. Fed. Energy Regulatory Comm'n* was reported at 775 F.2d 366, and is reprinted at 57a-92a.

The opinion of FERC in *Pacific Power and Light Co.*, 25 F.E.R.C. (CCH) ¶ 61,052 (1983) (Opinion No. 191) is reprinted at 95a-198a, and *Pacific Power and Light Co.*, 25 F.E.R.C. (CCH) ¶ 61,290 (1983) (Order Granting Interventions and Denying Rehearing) is reprinted at 93a-94a.

The Initial Decision of Administrative Law Judge Jon Lotis, *Pacific Power & Light Co.*, 23 F.E.R.C. (CCH) ¶ 63,037 (1983), is reprinted at 199a-309a.

The previous proceedings, called *Bountiful*, establishing that the municipal preference applies against an existing licensee, are: The Eleventh Circuit's decision in *Alabama Power Co. v. Fed. Energy Regulatory Comm'n*, 685 F.2d 1311 (11th Cir. 1982), *cert. denied*, 463 U.S. 1230 (1983), reprinted at 310a-326a; *City of Bountiful*, 11 F.E.R.C. (CCH) ¶ 61,337 (1980) (Opinion No. 88) reprinted at 329a-393a; and *City of Bountiful*, 12 F.E.R.C. (CCH) ¶ 61,179 (1980) (Opinion No. 88-A) (Order Granting Interventions and Denying Rehearing), reprinted at 327a-328a.

JURISDICTION

Pursuant to 16 U.S.C. 825l(b)(1986), the Clark-Cowlitz Joint Operating Agency (CCJOA) sought review in the District of Columbia Circuit of FERC's Opinion No. 191 issuing a new license to the Pacific Power & Light Company (PP&L) for the Merwin Project.

On October 22, 1985 a panel of the District of Columbia Circuit entered a judgment and opinion reversing FERC's Opinion No. 191 and remanded the case to the agency with instructions to reinstate the award of the license to CCJOA.

Rehearing en banc was sought by FERC and the existing licensee PP&L, and supported by the Department of Justice as *amicus curiae*. Rehearing en banc was granted, the panel opinion was vacated, and supplemental briefs were ordered submitted. On August 11, 1987 the en banc opinion was issued and judgment entered by the majority of a divided court affirming FERC's reversal of itself on the municipal preference issue, finding the Commission's actual analysis of the relative economic effects of a license transfer to be unreasoned and ordering a remand to FERC for further analysis of the economic impacts justifying its award of the license to PP&L.

The jurisdiction of this Court to review the en banc judgment of the District of Columbia Circuit is invoked under 28 U.S.C. § 1254(1)(1982).

STATUTE INVOLVED

Sections 7 and 15 of Part I of the Federal Power Act, respectively 16 U.S.C. § 800 (1982) and 16 U.S.C. § 808 (1982), as they existed prior to their amendment by the Electric Consumers Protection Act of 1986 (ECPA), Pub. L. No. 99-495, §§ 2, 4, 100 Stat. 1243, 1245 (1986), are set forth in their entirety at 394a-397a.

STATEMENT OF THE CASE

This petition seeks review and summary reversal of a 4-3 decision of the District of Columbia Circuit en banc upholding the refusal of the Federal Energy Regulatory Commission (FERC) to honor its own declaratory order interpreting provisions of the Federal Power Act, in the first proceeding to apply that order. It is for this Court to determine whether FERC's attempt to "overrule" its declaratory order in a subsequent adjudication, involving the same parties and the same legal issue, does violence to the important principle of administrative *res judicata*,

and effectively nullifies the declaratory order provision of the Administrative Procedure Act.

The declaratory order in the FERC proceedings known as *Bountiful* established that the Federal Power Act granted a preference to states and municipalities against the existing licensee in hydroelectric project relicensing cases. The Clark-Cowlitz Joint Operating Agency, then a municipal applicant competing for the Merwin project license, and the existing licensee, Pacific Power and Light Co., participated fully in the generic *Bountiful* declaratory order proceedings with CCJOA urging that the Act granted the preference, and PP&L urging it did not. The split en banc decision, reversing a D.C. Circuit panel, sanctions FERC's overruling of *Bountiful* in the pending *Merwin* case, and permits FERC to issue a new license for the Merwin project to PP&L and to deny that license to CCJOA.

The importance of this case reaches far beyond that of a typical administrative licensing decision. It involves fundamental questions of administrative law, including the proper application of principles of preclusion, statutory construction, retroactivity and importantly, simple fairness. The en banc majority's decision affirming FERC's holding that principles of preclusion do not require it to follow its own 1980 ruling on preference in the Merwin Project adjudication will have far-reaching effects on reliance and expectations of finality for all who participate in administrative proceedings.

The central legal question in the *Bountiful* and *Merwin* proceedings was whether Section 7(a) of the Federal Power Act, prior to its 1986 amendment, provided a preference for states and municipalities in every relicensing competition, or whether, as PP&L unsuccessfully argued in *Bountiful*, the preference applies only when the existing

licensee is not among the competitors for the new license.¹ That question has consumed nearly a decade of litigation. A recapitulation of the major events follows:

The Merwin Hydroelectric Project. The Merwin hydroelectric project is located on the Lewis River between Clark and Cowlitz Counties in Washington (see Map, inside back cover). The Clark and Cowlitz County Public Utility Districts each own and operate electrical distribution systems coextensive with their respective county boundaries.

The Commission issued the original license for Merwin to the Inland Power and Light Company in 1929 for a period of 50 years. In 1941, the Commission approved a

¹ Section 7(a), prior to its amendment in 1986, expressed a preference in these terms:

In issuing licenses to new licensees under Section 15 [16 U.S.C. § 808] of this title the Commission shall give preference to applications therefore by States and municipalities, provided the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region.

The dispute involves opposing interpretations on the scope of the municipal preference. FERC, in *Merwin*, has revived the statutory construction argument of opponents of municipal preference. The argument is that because the provisions of Section 15, cross-referenced by Section 7, address issuance of licenses to both "original" and "new" licensees, the municipal preference of Section 7(a) must therefore be considered limited to competitions between new applicants and does not apply when the "original" licensee is among the competitors. However, proponents of municipal preference argue that Section 7(a) sets standards for the Commission's decisionmaking process—its process of determining whether to issue a license to a "new" licensee—and every competitive proceeding will include a potential "new" licensee.

The legislative history of the Federal Water Power Act of 1920 is concisely set forth in the briefs of CCJOA and the City of Bountiful, Utah previously supplied to the Court in Nos. 82-1312, 82-1345, and 82-1346, *Utah Power & Light Co. v. Fed. Energy Regulatory Comm'n*, 463 U.S. 1230 (1983).

transfer of the license from Inland to PP&L.² See *Pacific Power & Light Co.*, 2 F.P.C. 508 (1941), and *Inland Power & Light Co.*, 1 F.P.C. 380 (1937).

In 1976, PP&L applied for a new license for the Merwin project. That same year, the two public utility districts formed the Clark-Cowlitz Joint Operating Agency to seek the new license for Merwin. CCJOA filed its application in 1977. The Commission consolidated the competing applications for further proceedings ["the *Merwin* proceeding"].

Bountiful. In September 1978, in response to petitions by the City of Bountiful, Utah and other municipal applicants seeking declaratory orders to resolve with finality the issue of municipal preference on relicensing of hydroelectric projects, the Commission publicly noticed the initiation of a declaratory order proceeding ["the *Bountiful* proceeding"]. FERC's notice invited full public participation, and virtually the entire public and private utility industry responded. The Commission set a briefing schedule for "resolution of a purely legal issue, a question of statutory construction which in no way hinges upon the facts of a particular case." *City of Bountiful*, Docket No. EL78-43 (May 3, 1979) (unpublished) (Order Granting Interventions and Setting Briefing Schedule), J.A. at 1-4.*

The Commission granted intervention to both CCJOA and PP&L and made it clear that the applicability *vel non* of municipal preference with respect to the *Merwin* proceeding was to be decided in *Bountiful*: "In addition—assuming for the sake of argument that we decide that Section 7(a) applies in relicensing cases—CCJOA and PP&L may litigate in the relicensing proceeding on the Merwin

² Thus PP&L is not an "original" licensee under Section 15. The majority en banc opinion nevertheless erroneously refers to PP&L as an *original* (emphasis the court's) licensee in finding FERC's new reading of the FPA reasonable. 28a.

*J.A. citations refer to the Joint Appendix filed in the D.C. Circuit.

Project, the separate specific question of whether CCJOA is entitled to such a preference," i.e., whether its plans were, or within a reasonable time could be made, equally well adapted. J.A. at 2.

After extensive briefing and an extraordinary full day of oral argument, the Commission issued its unanimous *Bountiful* opinion in June 1980. It declared the municipal preference applicable against the original licensee on relicensing, noting that such application would be a "tie breaker" following a Commission finding that the competing plans were "equally well adapted." 386a. The Commission said its role was *only* to determine "whether Congress included such a preference in Section 7 when it enacted the FWPA in 1920." 339a. The Commission left for resolution in the site-specific relicensing hearings to follow, a determination of the particular "public interest" factors which could be considered in selecting a new licensee. 389a-393a. The Commission further ordered that the processing of the pending competing applications "go forward in the light of this declaratory order." 393a.

In September 1981, the Commission set the competing Merwin applications for hearing, explaining that resolution of the case need not await judicial review of *Bountiful* because the purpose of the *Merwin* hearing was limited to a determination of whether CCJOA's plans were "equally well adapted" in the public interest to those of PP&L and that "[t]he outcome of the appeal of [*Bountiful*] will have a bearing in the instant proceeding only if the Commission finds, at the conclusion of the hearing, that the competing applications are equally well adapted." J.A. at 289-290.

The Eleventh Circuit Affirms Bountiful. Meanwhile, many private utilities, including PP&L, had appealed *Bountiful*. Those appeals were consolidated in the Eleventh Circuit. CCJOA had intervened in support of the Commission. In its brief, the Commission unequivocally defended its

interpretation of the municipal preference question, J.A. at 60, and informed the court that immediate resolution of the question was important:

There is no reason why the purely legal question of statutory interpretation present here would be affected by the facts of a particular case, nor did the Commission indicate its legal conclusion might later change depending on the factual setting. [Citation omitted]. Moreover, the immediate resolution of this issue will have a practical impact upon a number of licensing cases. Potential applicants (particularly municipalities with limited resources) need to know whether or not they will get the benefits of the statutory preference when they compete against the incumbent.

J.A. at 56 n.4.

The Eleventh Circuit found FERC's opinion "will have a direct and immediate impact upon the petitioners, the states and potential applicants, as well as the workload of the Commission," 320a, and affirmed the Commission on all counts. *Alabama Power Co. v. Fed. Energy Regulatory Comm'n*, 685 F.2d 1311, 1315 (11th Cir. 1982), 314a. The court held that the preference applies "in all competitive relicensing cases, not just those where the original licensee is not an applicant." 326a. In response to the private utilities' contrary interpretation that the "plain language" of the statute supported the view that original licensees were not subject to the municipal preference, the court stated "we easily overcome the plain meaning hurdle," 322a, finding that "the adoption of a 'limited preference' advantages incumbent licensees and thus leads to an absurd result." *Id.* Finding that "the Commission properly relied heavily upon legislative history," *Id.* at 323a, the court concluded that the Commission's construction of the statute was "consistent with the statute's language, structure, scheme, and available legislative history." 325a.

The Merwin Evidentiary Hearing. Three days after the Eleventh Circuit's decision, the *Merwin* hearing began. The applicability of the municipal preference was not disputed. Indeed, PP&L's post-hearing briefs conceded that *Bountiful* was binding on the *Merwin* case. Initial Brief of Pacific Power & Light Co. at 2, J.A. at 513-14.

PP&L argued at hearing that its costs for power alternative to the *Merwin* resource exceeded CCJOA's costs of alternative power, and thus, PP&L should receive the license "in the public interest." CCJOA disputed PP&L's alternative cost analysis, but more importantly, challenged the relevance of economic evidence to the licensing determination. CCJOA maintained that the relative economic impacts of a relicensing decision were not within the scope of the Commission's authority under Section 7(a) to assess the technical merits of the applicant's "plans" for utilization of the water resource. The case was submitted to the administrative law judge in February 1983.

The Commission's Secret Decision on Alternatives to Reverse Bountiful. While the *Merwin* proceeding was still pending before the ALJ, the private utilities filed petitions for a writ of certiorari to the Eleventh Circuit in *Bountiful*. On April 25, 1983, the Commission, which by then included several new Commissioners who had not participated in deciding *Bountiful*, held a closed meeting to discuss those petitions. As the Commission later revealed, a majority of the Commissioners at the meeting expressed their disagreement with *Bountiful* and voted to request the Solicitor General to recommend that the Supreme Court grant the petitions for certiorari, vacate the judgment of the Eleventh Circuit, and remand *Bountiful* to the Commission for reconsideration. J.A. at 108.³

³ The Commission later revealed that it also discussed *Merwin* as an "alternative forum [] for confronting the municipal preference in case it was not resolved in *Bountiful*." FERC's Opposition to CCJOA's Cross Motion at 7, dated September 6, 1983, see *CCJOA v. FERC*, D.C. Cir. No. 83-2111, Joint Appendix at 169.

The ALJ's Decision to License CCJOA. Three days after the Commission's closed session and secret decision to reverse *Bountiful*, the *Merwin* ALJ issued his decision. Based on the evidence offered on the competing applicants' plans for electric generation, hydraulic coordination, flood control, recreation, and fish and wildlife concerns, the ALJ concluded that the plans of the two applicants were equally well adapted, that preference should therefore be given pursuant to Section 7(a) of the Act to the application of CCJOA, that a license should issue to CCJOA. The ALJ also set the formula for calculation of the net investment payable to PP&L upon a license transfer pursuant to Section 14 of the Act, 16 U.S.C. 807. 283a.

The ALJ also found that the relative economic benefits of *Merwin* to the competing applicants were beyond the scope of matters entrusted by Congress to the Commission's purview under Section 7(a), but in any event, a license transfer would not change the total requirements for or supplies of power in the Pacific Northwest and the ultimate effect on costs and benefits in the region would be an "economic wash." 252a.

Bountiful Becomes Final. The Solicitor General, on behalf of the Commission, filed with this Court a brief in support of the private utilities' request for certiorari in *Bountiful*. Importantly, as to the binding nature of *Bountiful* the Solicitor General stated: "Under traditional res judicata principles, if this Court denies certiorari and the Court of Appeals judgment affirming the Commission's declaratory order becomes final, these entities may be bound by the Commission's order in any future relicensing proceeding." J.A. at 107. The brief recommended remand, not to the Commission, but to the Eleventh Circuit for such reconsideration as deemed appropriate in view of the "intervening circumstance" that four new Commissioners appeared ready to overrule *Bountiful*. It was not represented that *Bountiful* had been wrongly decided.

In July 1983, this Court denied certiorari, terminating the *Bountiful* litigation. *Utah Power & Light Co. v. Fed. Energy Regulatory Comm'n*, 463 U.S. 1230 (1983). The issue of the applicability of the municipal preference on relicensing appeared finally settled.

The Commission's Merwin Decision. Despite the apparent finality of *Bountiful*, the Commission destroyed the result in reviewing the ALJ's decision in *Merwin*, in Opinion No. 191. 95a-198a.

Without any published notice to CCJOA or anyone else that the apparently settled *Bountiful* case would be reconsidered in *Merwin*, without any public input, and without any request from the parties in *Merwin*, a majority of the new Commissioners *sua sponte* "overruled" *Bountiful* and held that states and municipalities do not have a preference in any relicensing case involving the "original licensee." 99a. In contrast to its representations to the Eleventh Circuit, FERC concluded that the statutory preference was limited, applying "against all adversary non-preference applicants *other than* 'original licensees' in possession of project works," (emphasis added), and, reversing the ALJ, issued the new license to PP&L. *Id.*

In justifying their changed view, the new Commissioners adopted all of the legal arguments that had been rejected unanimously by their predecessors and the Eleventh Circuit. The Commission made clear that the real concern was that it disagreed with the policy established by Congress in the Federal Power Act. The new Commission majority disparaged the public preference embodied in the 1920 Act as "a conception of that era," 141a, whose relationship to the public interest is "considerably weaker today than in 1920." 148a. The Commission found CCJOA's plans equal to PP&L's with respect to power production, flood control, fish and wildlife and recreational facilities, but nevertheless concluded that broad economic considerations were within the Commission's scope of review and

that these "weigh in favor of allowing the power benefits of the Lewis River at Merwin to remain with the segments of the public served by PP&L." 150a.

Two Commissioners dissented from the overruling of *Bountiful*. Commissioner Hughes urged that "the time for finality has arrived" as to the relicensing preference issue. 198a. Commissioner Sheldon's separate opinion questioned how the agency could maintain its image and credibility "as a tribunal" and "[h]ow can such a body ask the appellate courts to defer to its 'expertise?'" J.A. at 697-698.

CCJOA requested rehearing of Opinion 191, J.A. at 707-769. The Commission denied rehearing in a two-page *pro forma* order. 93a-94a.

The D.C. Circuit Panel's Reversal of FERC. CCJOA sought review in the District of Columbia Circuit of FERC's Opinion No. 191 pursuant to Section 313(b) of the Federal Power Act, 16 U.S.C. § 825(b)(1982). In its October 22, 1985 opinion, the D.C. Circuit reversed FERC's Opinion No. 191 and remanded with directions to reinstate the ALJ's decision awarding the license to CCJOA. 57a.

On the preclusion issue the court held that the "[preference] issue which the Commission seeks to relitigate is one which is and ought to be closed." 73a. The panel said that the facts with respect to the preference were identical, that all of the *Merwin* parties had been parties in *Bountiful*, and that it was "amply evident . . . as to parties to *Bountiful*, FERC was not entitled to relitigate the municipal preference question." 76a.

As to the statutory construction issue, the court held:

In short, the statute on its face may be somewhat unclear; but the legislative history removes any shadow of doubt as to what Congress wanted to happen when relicensing time arrived. The municipal preference applies to all relicensing including those involving an incumbent licensee.

84a.

The court also agreed with CCJOA that the Commission did not have statutory authority to use economic impacts to second-guess Congressional intent, which would "render the statutorily-mandated municipal preference a nullity." 85a; and that even if FERC could use economic impact as a decisional criterion, its application of economic impact analysis to the present case would have to be reversed as arbitrary and capricious. 88a.

FERC and PP&L sought rehearing en banc of the panel opinion. The Department of Justice supported FERC's petition. Rehearing en banc was granted, and the panel opinion vacated. Supplemental briefing was ordered to answer questions specified by the court.

Electric Consumers Protection Act. While rehearing en banc was pending, Congress amended Section 7(a) of the Federal Power Act to eliminate the municipal preference in all relicensings but specifically provided that the *Merwin* proceedings continue to be governed by the existing statute. Electric Consumers Protection Act of 1986 (ECPA), Pub. L. No. 99-495, 2, 11, 100 Stat. 1243, 1245 (1986). The legislative history explained the *Merwin* exemption:

The issues before the court in the *Merwin* case are not intended to be resolved or affected by this bill. We do not interpret the law as it exists today, nor do we urge the court to decide for or against the existence of preference. The courts must resolve the matter without regard to H.R. 44.

... In view of the advanced state of the *Merwin* proceeding and in fairness to the legitimate expectations of the competing applicants, all proceedings related to this case should continue to

be governed by the provisions of current law as interpreted in judicial decisions.

H.R. Rep. No. 99-507, 99th Cong. 2d Sess. 16-17, 48 (1986).⁴

D.C. Circuit En Banc Opinion. The 4-3 opinion of the D.C. Circuit en banc was issued and judgment entered on August 11, 1987. The majority held that preclusion principles do not require that PP&L be bound in *Merwin* by the Commission's decision in *Bountiful*. 9a-14a.

The majority upheld FERC's new statutory interpretation, citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). It held that FERC's construction was a reasonable one and that the statute allowed FERC to take into account the economic consequences of its award of a new license. However, it found that FERC's actual economic analysis "falls short of the standards of reasoned decision making and thus requires a remand of the case to the agency." 5a.

Three judges dissented, stating: "The court today manages in one opinion to do violence to principles of preclusion, retroactivity and statutory interpretation." 39a. The dissent found FERC precluded from reversing its holding in *Bountiful* as to CCJOA and PP&L, and FERC's reinterpretation on municipal preference "untenable" and one which "leaves the statute meaningless." 54a, 55a.

CCJOA requested, pending certiorari, a stay of the Circuit's remand. The Court en banc denied the petition for stay.

This petition for certiorari followed.

REASONS FOR GRANTING THE WRIT

Review by this Court is necessary to reverse the failure below to recognize the applicability of *res judicata* to an

⁴ See also S. Rep. No. 99-161, 99th Cong., 1st Sess. 10-11 (1985).

administrative agency, contrary to holdings of this Court; to resolve the conflicting and anomalous results from two circuits on a strict question of law arising out of applying substantially the same principles of judicial review of agency action; and to reverse action allowing the agency to subvert the municipal preference by an economic impact analysis.

I. The Majority En Banc has Violated the Law Declared in *United States v. Utah Construction and Mining Co.*, That Res Judicata Applies to Administrative Adjudication

This Court has made it clear that a final adjudicative determination by an administrative tribunal has the same res judicata effect on the litigating parties as a judgment of a court:

When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose.

United States v. Utah Constr. and Mining Co., 384 U.S. 394, 422 (1966).⁵

⁵ The *Utah* holding was cited in *Hayfield Northern R.R. Co. v. Chicago and North Western Transp. Co.*, 467 U.S. 622, 636, n.15 (1984), as authority for the proposition that an I.C.C. ruling "may well have preclusive effect in state condemnation proceeding." See also *Pacific Tel. & Tel. v. Public Utilities Comm'n*, 443 U.S. 1301, 1304 (1979) and *Kremer v. Chemical Constr. Co.*, 456 U.S. 461, 485 n.26 (1982). See also dissenting opinion to the denial of certiorari in *McCarren v. Town of Springfield*, 464 U.S. 942, 944-945 (1983), in which then-Justice Rehnquist cited *Utah* as a reason for granting certiorari to review the refusal of a federal district court to accord any res judicata effect to a determination of the Vermont Public Service Board.

The fundamental importance of the preclusion principles involved

Utah Construction clearly requires that FERC's declaratory order in *Bountiful* be given res judicata effect in *Merwin*.

The majority opinion of the divided Circuit en banc misconstrued the nature of res judicata and made its primary focus the preclusive effect on FERC of the Eleventh Circuit's opinion. As noted by the dissent, the "more important" issue is the preclusive effect of FERC's *Bountiful* decision on PP&L in the *Merwin* litigation. 51a-52a. PP&L litigated and lost the municipal preference issue in *Bountiful*. The question before the en banc court was therefore not, "an agency's ability to change its mind about the law and to act upon its new interpretation," (9a), as the majority stated, but rather an agency's ability to reverse itself on the same legal issue *between the same parties*.

The majority dismissed this application of preclusion by footnote, stating, that since the decisionmaker, FERC, and not PP&L, changed its mind on municipal preference, preclusion was "irrelevant." 13a n.5. With deference, this rather naive argument simply decimates res judicata. There is no real difference between a party asking a tribunal to ignore matters litigated and lost and the tribunal itself doing so *sua sponte*. The end result is the same. The goals of preclusion—to protect against repetitious litigation, to promote confidence in decisions, and to secure repose—are equally frustrated.

here has been recognized by this Court:

[T]his court has consistently emphasized the importance of the related doctrines of res judicata and collateral estoppel in fulfilling the purpose for which civil courts had been established, the conclusive resolution of disputes within their jurisdiction. Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.

Kremer v. Chemical Constr. Co., 456 U.S. at 466-467 n.6 (1982).

The majority's footnote also contends that even if preclusion of PP&L was to be considered, the doctrine should not be applied if it would result in "inequitable administration of the law." *Id.* That would be the result here, the majority says, because it would accord CCJOA a benefit denied by Congress in the passage of ECPA to others similarly situated, while burdening PP&L in a way the numerous other private utilities in *Bountiful* would not be burdened. *Id.*

Again, with all due respect, this view totally disregards the action taken by Congress when it expressly *excepted Merwin* from ECPA. As the legislative history of ECPA makes clear, "[t]he issues before the court in the *Merwin* case are not intended to be resolved or affected by this bill. . . . The courts must resolve the matter without regard to [ECPA]"; and "[i]n view of the advanced state of the *Merwin* proceeding and in fairness to the legitimate expectations of the competing applicants, all proceedings related to [*Merwin*] should continue to be governed by the provisions of current law as interpreted in judicial decisions."⁶ Despite these Congressional directives, the en banc majority nevertheless has used ECPA to rationalize its failure to enforce *res judicata*, arriving at an unfair result.

The majority's mistaken view of what is equitable must in any event yield to *res judicata*. As this Court stated in *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981); "There is simply 'no principle of law or equity which sanctions the rejection by a federal court of the statutory principles of *res judicata*.'"⁷

⁶ *Supra* at 13. Furthermore, if the majority's view goes uncorrected, CCJOA will be left empty-handed and minus the substantial monies it has expended in its long effort to vindicate the statutory preference while other municipal competitors will be able under ECPA to collect, at a minimum, their pre-ECPA expenses of pursuing their competing applications. ECPA, § 10.

⁷ *Moitie's* holding that there is no rule of law permitting a tribunal

The majority's rationale that "as a general matter preclusion principles are to be applied more flexibly to administrative adjudication than to judicial proceedings," 13a n.5 ignores the very purpose of the *Bountiful* declaratory order proceeding: to resolve with finality the municipal preference question.⁸

to reverse the effect of a final prior judicial decision on parties to them, even if it believes the decision incorrect, 452 U.S. at 399, has been undercut by the en banc majority's views on the lack of effect here of the Eleventh Circuit's opinion affirming *Bountiful*. That view appears to ignore the D.C. Circuit's own teachings in *City of Cleveland v. Fed. Power Comm'n*, 561 F.2d 344 (D.C. Cir. 1977) concerning the inviolability of the mandate of an appellate court by an inferior court or administrative agency. Whether considered as the "mandate rule," or "law of the case", the principles involved "... indulge no exception for reviews of administrative agencies" 561 F.2d at 346. Further, the Commission's action in *Merwin* gives absolutely no effect to the Eleventh Circuit's mandate and would, if sustained, necessarily make that court's ruling a meaningless and unconstitutional effort with no effect on any cases or controversies. See *United Public Workers v. Mitchell*, 330 U.S. 75, 89 (1947); L. Tribe, *American Constitutional Law* 56-58 (1978).

Similarly, but somewhat further afield from the real issue here, the en banc's massive struggle with retroactive application of agency action, on which a positive finding apparently had to be made in order to support FERC's flip-flop, shows deep division on the proper application of that Circuit's own rules in *Retail, Wholesale & Dept. Store Union v. NLRB*, 466 F.2d 380 (D.C. Cir. 1972). The principle concerns of retroactivity doctrine, "lack of notice and degree of reliance on former standards," *Id.* at 390 n.22, so important to the vast company affected by agency action, were both poorly served here, as the dissent's dissection of retroactivity illustrates. 39a-54a. As we have noted, the majority's view (expressed also as part of its retroactivity exercise) that CCJOA would get an unwarranted benefit if retroactivity were withheld is not borne out by the law or the facts.

* Restatement (Second) of Judgments § 33 (1982) describes the effect of declaratory orders:

A valid and final judgment in an action brought to declare rights or other legal relations of the parties is conclusive in a subsequent action between them as to the matters declared, and in accordance

As the dissent below observed: "The guiding principle for application of preclusion doctrine to agency adjudication is that 'res judicata applies where what the agency does resembles what a trial court does. Such a resemblance or lack of it applies to determinations of law as well as to determinations of fact.'" 52a, citing K. Davis, 4 *Administrative Law Treatise*, 52 (2d. ed. 1983).⁹ All the elements for application of res judicata were present in *Merwin* which was an adjudication concerning the same issue, and the same parties.

with the rules of issue preclusion, as to any issues actually litigated by them and determined in the action.

FERC declaratory order proceedings, based on 5 U.S.C. 554(e), are clearly adjudications, entitled to full preclusive effect. The legislative history of 5 U.S.C. 554(e) notes: "The administrative issuance of declaratory orders would be governed by the same principles that govern declaratory judgments in the courts. Such orders, if issued, would not bind those not parties to them, or determine subject matter not presented." H.R. Rep. No. 1980, 79th Cong. 2d Sess. 31 (1946).

The Commission's reversal of *Bountiful* violates the rule that declaratory actions must settle "an autonomous and independent dispute, involving issues of vital importance to the parties involved." 6A J. Moore, *Moore's Federal Practice* ¶ 57.08[4] at 48 (2d ed. 1983). If the *Merwin* decision stands, the declaratory proceeding in *Bountiful* will not have settled anything, even as between CCJOA & PP&L.

The en banc court called for supplemental briefs on several specific questions about agency declaratory proceedings, whether they might be viewed as rulemakings and whether they had the same preclusive effect. The responses generally indicated that while agency usage varied and was not as frequent as it might be, declaratory proceedings at FERC and its predecessor, FPC, were not at all unusual, were fully provided for in FERC's rules, were considered binding, and had been of long-standing. See Comment, *Declaratory Orders, Uncertain Tools to Remove Uncertainty?* 21 Ad. L. Rev. 257 (1969).

⁹ Similarly, the Restatement (Second) of Judgments § 83 (1982) provides in relevant part that "a valid and final adjudicative determination by an administrative tribunal has the same effects under the rules of res judicata, subject to the same exceptions, as a judgment of a court."

The majority's examination of the preclusion issue in terms of preclusion of FERC by the Eleventh Circuit is also flawed. The court refuses to preclude FERC, because it views the issue of whether a municipal preference applies in all relicensings as a different issue than whether a municipal preference does *not* apply to relicensings to which the incumbent licensee is a party. 11a. As a matter of logic, this argument is absurd. For *res judicata* purposes, the dissent correctly recognized the positive of an issue is the same as the negative of an issue. 43a. As a matter of law, the argument is also absurd: either the statute grants a meaningful municipal preference (a preference which applies against an existing licensee) or it does not. This question of law was decided affirmatively in *Bountiful*, by both FERC and the Eleventh Circuit, and FERC is bound by this with respect to PP&L and CCJOA.

Finally, the en banc result seriously undercuts the utility of administrative declaratory proceedings. This "valuable tool", 54a, established by Congress in Section 554(e) of the Administrative Procedure Act and to be given the same effect as governs declaratory judgments in the courts, cannot, in the face of this opinion, be utilized with any real confidence. This result is particularly disturbing coming as it does from the D.C. Circuit which, at the seat of government, deals with far more administrative agency actions than any other. As the dissent concluded (*Id.*) "the court's result thus works a substantial disservice to both preclusion doctrine and administrative law." 54a.

This erroneous and unfortunate result should be corrected by summary reversal.

II. Reversal is Required to Correct the En Banc Majority's Erroneous Statutory Interpretation On the Municipal Preference Question

This Court should correct (and can, by enforcing *res judicata*) the anomaly arising out of the Eleventh Circuit's upholding preference in *Bountiful* and the D.C. Circuit's

upholding no preference in *Merwin*. This Court is the last word on what Congress intended by the municipal preference declared in the Act.

FERC's decision in *Bountiful*, the Eleventh Circuit's decision in *Alabama Power*, the D.C. Circuit panel's decision in *Merwin* and the en banc dissent, were all consistent and correct in holding that the Act grants a preference to municipalities over all other applicants, including the original or prior licensee. Even the majority below found the CCJOA view "not without force" and conceded that FERC's new look was "not entirely free from doubt." 30a-31a. Yet the majority said it was "duty bound" under the principles of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to uphold FERC since it was "beyond cavil" that Section 7(a) was reasonably susceptible to FERC's new interpretation. 31a (see other *Chevron* references at 4a, 12a, 23a, 26a, 30a and 33a). The result is the diametric opposite of the reading of the Act upheld in *Bountiful*.

While this unfortunate spectacle is not considered as such in the opinion below, See 11a-12a, the fact is that the Eleventh Circuit pre-*Chevron*, but in effect applying *Chevron* principles, found it could "easily overcome" the private utilities' "plain meaning" reading of Section 7(a) (the same view FERC adopts now as its reinterpretation), found that view led to "absurd results", and had no support in the legislative history. 322a-323a. The Eleventh Circuit further found the prior Commission's interpretation "consistent with the statute's language, structure, scheme and available legislative history." 325a. These conclusions contrast sharply with the holdings below that FERC's reinterpretation "is reasonable and consistent with Congressional intent," 5a, see also 26a, 28a and 38a, and that "[n]othing in the legislative history warrants upsetting this construction of the statute," 31a.

Such disparate and incompatible results, through application of this Court's holdings on the scope of judicial review of agency determinations to justify them, warrant correction by this Court. Putting to one side how the question reached the two Circuits, the question throughout has remained the identical *legal* question that the Commission framed in *Bountiful* for decision.

Chevron emphasizes the necessity of finding Congressional intent as the first factor to consider on judicial review. 467 U.S. at 842. The Court in *Immigration and Naturalization Service v. Cardoza-Fonseca*, 107 S. Ct. 1207, 1220, 1221 (1987), recently reiterated that principle, along with *Chevron's* teaching that "the judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent" 467 U.S. at 843 n.9.

There is ample legislative history showing that "clear congressional intent" requires rejection of FERC's reverse interpretation. As just one example, Congressman Lee, a manager of the Conference Committee on the bill which became the Act, told the House:

In the development of water powers by agencies other than the United States, the bill gives preference to States and municipalities over any other applicant, both in the case of new developments and in case of acquiring properties of another licensee at the end of a license period.

83a.

Pointing to similar support in the legislative history the D.C. Circuit panel concluded that while the statute on its face might be somewhat unclear:

... the legislative history removes any shadow of doubt of what Congress wanted to happen when relicensing time arrived. The municipal

preference applies to all relicensing including those involving an incumbent licensee.

84a. The legislative history as summarized in that opinion, 78a-84a, is compelling and dispositive of the en banc majority view that "*nothing*" in that history warrants upsetting FERC's construction of the statute in *Merwin*.

The judgment below should be reversed to make clear that courts must resolve questions of statutory construction by correcting agency deviations from express congressional intent.

III. The Court Should Not Allow the Commission to Use an Economic Impact Analysis to Circumvent Application of the Municipal Preference

The Commission in *Bountiful* determined that the municipal preference of Section 7(a) does apply against the existing licensee as a "tie breaker" in the event a municipal applicant's plans are found "equally well adapted, to conserve and utilize in the public interest the water resources of the region." 389a. *Bountiful* provided that whether there is a tie or not "will depend upon the factors that the Commission takes into account to determine how well each of the competing plans would conserve and utilize the water resources of the region in the public interest. *Id.* While FERC expressed "some generalizations" about the public interest determination, it indicated it would be "premature to address the applicability; relevancy and materiality of particular areas of consideration," which would "vary from case to case," and therefore "left it to the Commission to determine the 'public interest' in the light of the facts and contentions in each particular application." 389a-393a.

The ALJ found the relative economic effects of issuing a new license to be outside the Commission's purview when applying the municipal preference under Section 7(a). 252a. FERC, in Opinion No. 191, overruled its own earlier hold-

ing on municipal preference in *Bountiful* as well as the ALJ's determination that economic impacts cannot be used to overrule the mandatory municipal preference, and then awarded the license to PP&L on the sole basis that the economic effects of a license transfer in its view justified giving PP&L another long-term license. 149a-150a.

The D.C. Circuit panel reversed FERC, agreeing with the ALJ that such economic impacts were not encompassed within FERC's authority to assess an applicant's technical, water-power related "plans," under Section 7(a), and also found FERC's actual economic impact analysis arbitrary and capricious. 88a.

The D.C. Circuit en banc held that, because the Merwin relicensing competition does not involve the municipal preference of Section 7(a) and instead is a proceeding "arising under the latter half of Section 7(a), . . . FERC may include in its deliberations consideration of the economic consequences of the grant of a license." 33a. However, even the en banc majority found that FERC's actual economic analysis employed in *Merwin* to deny CCJOA the license was unreasoned and ordered a remand for further "elucidation." 38a.

This Court's reversal of the en banc majority on res judicata grounds and consequent application of municipal preference to the *Merwin* proceeding will bar FERC upon any remand from utilizing the relative economic consequences of a license transfer to circumvent the municipal preference and to deny CCJOA the license. As the D.C. Circuit panel held, if FERC could issue a new license on its own view of the economic consequences, it "would render the statutorily-mandated [m]unicipal preference a nullity." 85a. In view of the long and tortuous path CCJOA has been forced to travel, CCJOA asks confirmation of that conclusion as to economic consequences so there can be no question that CCJOA will be shielded from a further round of FERC machinations and appeals on this subject.

CONCLUSION

For the foregoing reasons, the writ should be granted, the en banc decision of the D.C. Circuit summarily reversed, and the case remanded with directions to reinstate the award of the license to CCJOA.

Respectfully submitted,

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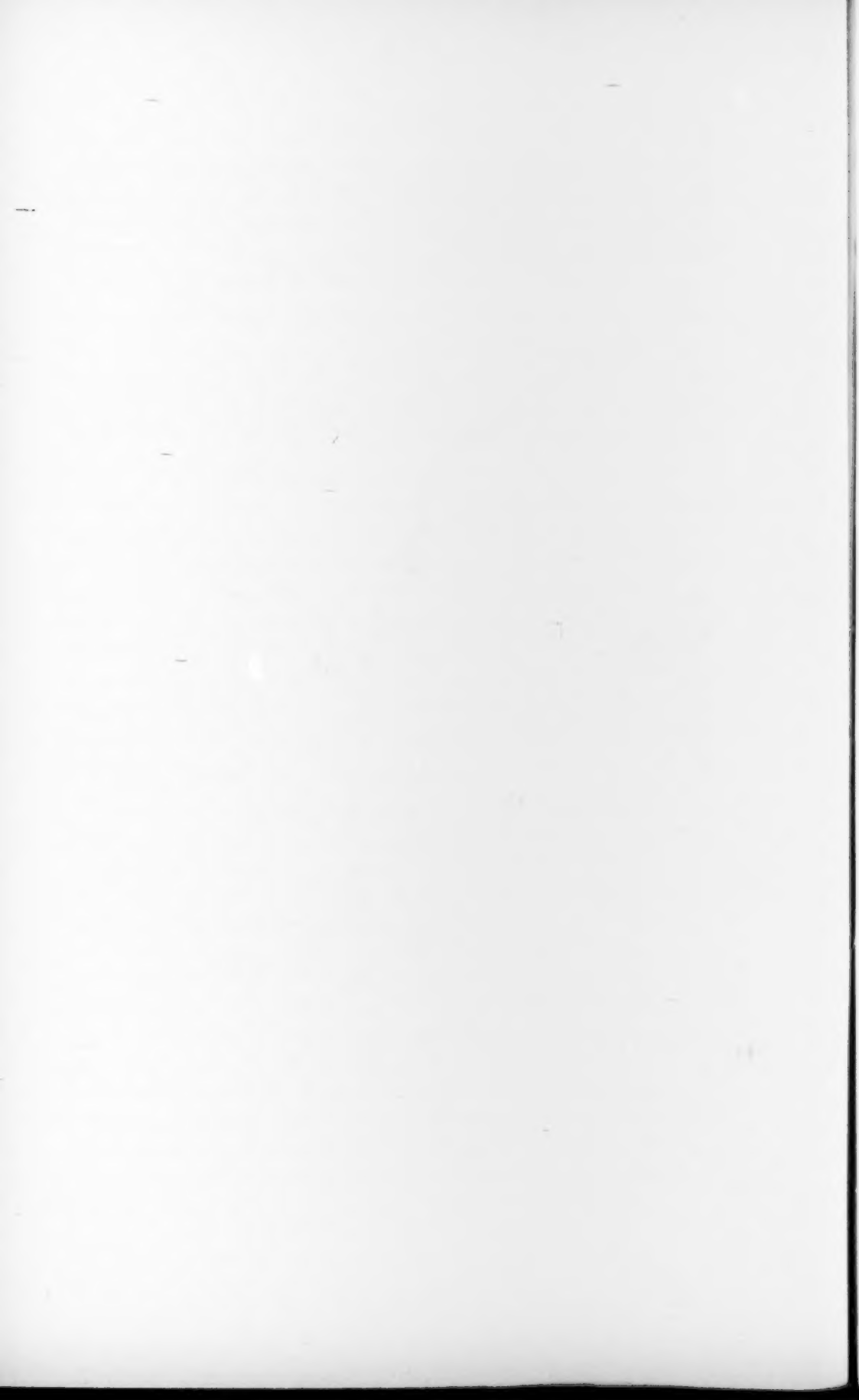
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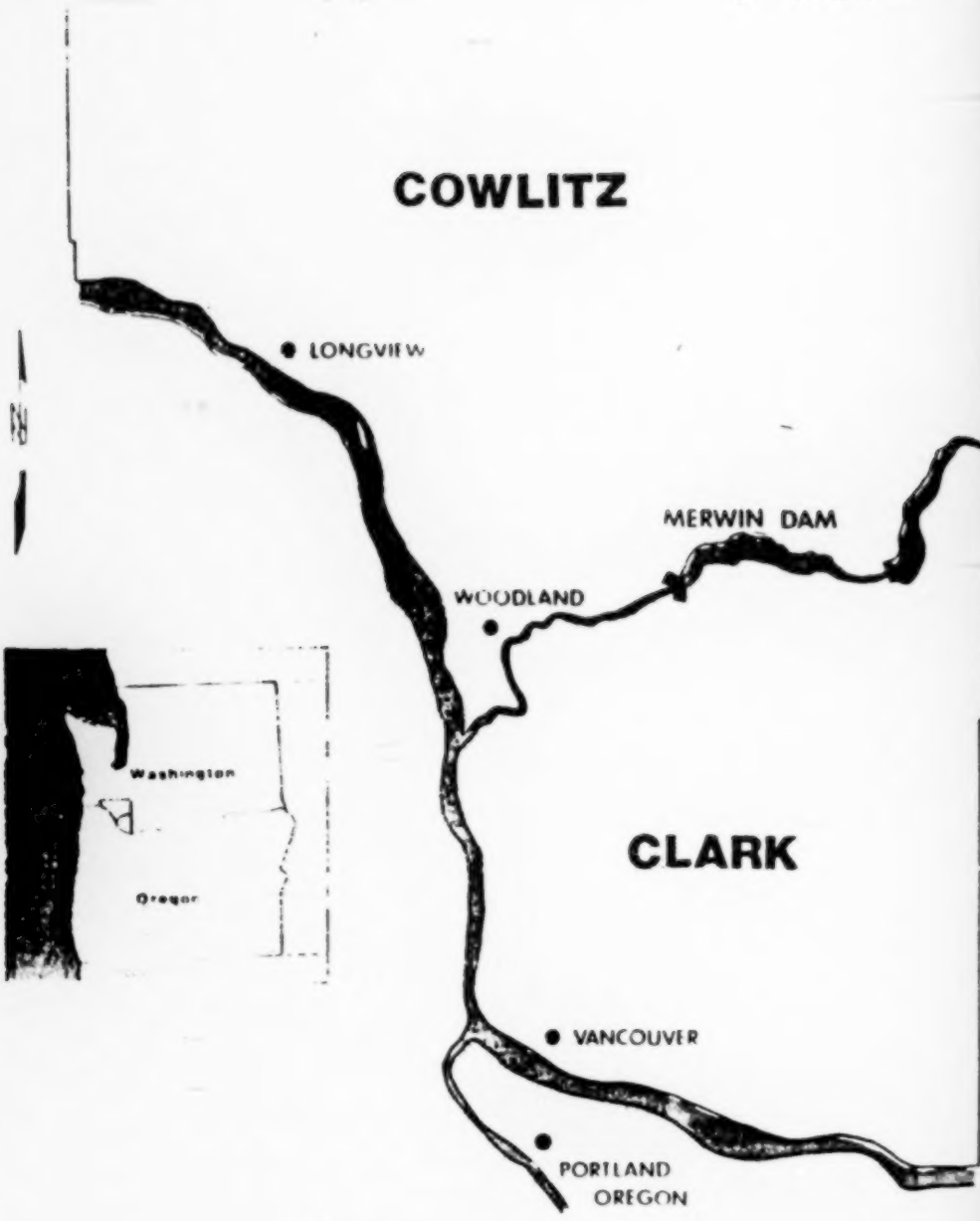
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